(3)

No. 88-1501

Supreme Court, U.S.
FILED
APR 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

EASTMAN KODAK COMPANY,

Petitioner,

v.

POLAROID CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITIONER'S REPLY MEMORANDUM

RICHARD E. CARLTON
125 Broad Street
New York, New York 10004
(212) 558-4000
Counsel for Petitioner

ROBERT MACCRATE
EDWARD W. KEANE
SULLIVAN & CROMWELL
Of Counsel

April 19, 1989

10 pp

Amended Rule 28.1 Statement

The subsidiaries and affiliates of petitioner Eastman Kodak Company, other than wholly owned subsidiaries, are listed below:

American Health Cap Assoc LP; Anglia Supercolour Studios Limited; APA Capital Risque II; APA Capital Risque II (A); Cauzin Systems, Inc.; Chinon Industries Inc.; City Photo Limited; Coda; Consumer Developments Ltd.; Cytogen; Dainichiseika-Sterling Co. Ltd.; De Forenede Fotolaboratorier A/S; Enzon; Farvelabben A/S; Fotographics (N.Q.) Pty. Ltd.; Fototec SA; H&Q Life Science Venture; Horsley Keough Ltd, Partnership; IDLC Limited; Immunex; India Photographic Company Limited; Industria Fotografica Interamericana, S.A. de C.V.; Japan/U.S. Ventures Partners; Kamata Pro Photo Y.K.; Kasei Verbatim Kabushiki Kaisha; K.K. Big Color Service; K.K. East West; K.K. Joy; K.K. Qualte; K.K. Soft Lab; K.K. Techni-Color Angel; K.K. Tokyo Color Lab.; Kodak Nagase Medical K.K.; Kodak-Pathe; Laserdrive Ltd.; LK-TEL Video S.A.; Mackwoods-Winthrop Ltd.; Mafano Pty. Ltd.; Microelectronics and Computer Technology Corporation; Miller Bros. Hall & Company Limited; Morgan Stanley Research Ventures L.P.; Neorx Corporation; Nueva Vision S.A.; Ordimat S.A.R.L.; Photo Finishers (Glasgow) Limited; P.T. Sterling Products Indonesia; Qualex; Quick Processing Industries (UK) Limited; Quimica Farmaceutica Platense, Sociedad Anonima Industrial y Comercial; The Roll Film Company Limited; Seaga Pty. Ltd.; Seaga (VIC) Pty. Ltd.; Sopexim SA; Spaceworld A/S; Sterling Products (Ghana) Ltd.; Sterling Products (Nigeria) Ltd.; Sterling Products Pakistan (Private) Ltd.; Sterling Yamanouchi Pharmaceutical Inc.; Sujata Verbatim Limited; Taylors Developing & Printing Works Limited; T.J. Kenyon (Stevenage) Limited; Venture Founders Cap. Ltd. Partners; Verbatim Comercial Ltda.; Verbatim Do Amazonas Industrial Ltda.; Vischrome Pty. Ltd.; Winster Pharmaceuticals Ltd. and Y.K. Yamagata Taigyo Photo.

TABLE OF AUTHORITIES

PAGE

Cases

In re Drexel Burnham Lambert, Inc., CCH Fed. Sec. L. Rep. ¶ 94,198 (2d Cir. 1989) (denial of rehearing en banc), *petition for cert. filed sub nom. Milken* v. *SEC*, — U.S.L.W. — (U.S. April 5, 1989) (No. 88-1628) 3

Liljeberg v. *Health Services Acquisition Corp.*, 108 S. Ct. 2194 (1988) 2, 3

Parker v. *Connors Steel Co.*, 855 F.2d 1510 (11th Cir. 1988), *petition for cert. filed*, 57 U.S.L.W. 3655 (U.S. March 14, 1989) (No. 88-1535) .. 4

Potashnick v. *Port City Construction Co.*, 609 F.2d 1101 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980) 2, 5

William Cramp & Sons v. *International Curtiss Marine Turbine Co.*, 228 U.S. 645 (1913) 1

Statutes and Rules

Title 28 United States Code
Section 455 ..... *passim*

Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1007, 102 Stat. 4642 (Nov. 19, 1988) 5

Federal Rules of Civil Procedure
Rule 54 ..... 2, 4
Rule 60 2

Legislative History

H.R. Rep. No. 100-889, 100th Cong., 2d Sess. 68 (1988) 5

IN THE

Supreme Court of the United States

October Term, 1988

No. 88-1501

EASTMAN KODAK COMPANY,

Petitioner,

v.

POLAROID CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITIONER'S REPLY MEMORANDUM

In its Brief in Opposition Polaroid ignores or attempts to paper over the reasons why this case merits review:

1. Polaroid's assertion that the decision below is "not in conflict with any applicable opinion of this Court or with any decision of another Court of Appeals" (Br. in Opp. 10) is wrong on both counts.

The decision below conflicts with, *e.g.*, *William Cramp & Sons* v. *International Curtiss Marine Turbine Co.*, 228 U.S. 645 (1913) (*see* Pet. 10-11), in which this Court vacated a lower-court decree solely because of the participation, with the parties' express consent, of a judge disqualified by statute. Polaroid does not suggest that *Cramp* is no longer good law and offers no coherent reason why it does not control the present case.

Nor does Polaroid draw any meaningful distinction between this case and the numerous cases in which courts of appeals have vacated orders and judgments rendered by disqualified judges, sometimes after protracted proceedings. *See* Pet. 11-12 & n.11; *Potashnick* v. *Port City Construction Co.*, 609 F.2d 1101, 1115 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980) (despite "unfairness" and "expense," judgment entered after 33-day trial reversed because trial judge was disqualified by statute).

2. Polaroid contends that *Liljeberg* v. *Health Services Acquisition Corp.*, 108 S. Ct. 2194 (1988), obliterated the fundamental distinction between interlocutory orders and final judgments by subjecting all Section 455 motions to identical "guidelines." This Court's opinion clearly negates such a notion. For example, the Court began its analysis by stating that the issue with respect to remedy was "whether relief is available under Rule 60(b) when [a Section 455(a)] violation is not discovered until after the judgment has become final," *id.* at 2201, and what Polaroid calls the "guidelines" were immediately prefaced by a reference to "Rule 60(b)(6) relief" and to considerations appropriate "in determining whether a judgment should be vacated," *id.* at 2204. In this context, the word "judgment" unmistakably meant *final* judgment, *see* F. R. Civ. P. 54(a), and the "guidelines" were obviously rooted in Rule 60(b).

Given the facts of the *Liljeberg* case, this Court had no occasion to consider the relief available for a Section 455(b) violation when, as here, such relief can be granted without vacating a final judgment.

3. Polaroid makes repeated assertions that *Liljeberg* involved a violation of Section 455(b)(4) as well as of Section 455(a), but it fails to point out that the Section 455(b)(4) violation could not have affected the judgment

because it did not occur until *after* the judgment had been entered. *See* 108 S. Ct. at 2206. It was the Section 455(a) violation alone that tainted the judgment, and undoubtedly for that reason this Court referred to the Section 455(b) violation only in passing.

In the present case it is entirely possible that Judge Zobel's Section 455(b) violation affected her crucial ruling as to the validity and infringement of the Polaroid patents. That violation continued throughout the trial, throughout the period of her deliberations and until long after she filed her ruling. There can be no assurance that the disqualifying circumstance—Judge Zobel's awareness that her ruling could substantially affect the value of her mother-in-law's 1,000 shares of Kodak stock—in fact had no influence on that ruling.[1] Thus Polaroid's insistence that Kodak received a fair trial unblemished by bias or improper influence is at best an unfounded speculation. It is also erroneous as a matter of law, for Congress has decreed that when a judge's close relative has an interest that could be substantially affected by the outcome of the litigation, proof of actual bias is unnecessary; to safeguard against the possibility of bias, and above all to promote public confidence in the federal judiciary, Congress has made recusal mandatory in such circumstances. To wink at a Section 455(b) violation is to undermine this salutary congressional purpose.[2]

---

[1] It is of course immaterial whether a judge favors a relative's financial interest or "bend[s] over backward . . . in order to demonstrate impartiality." *In re Drexel Burnham Lambert, Inc.*, CCH Fed. Sec. L. Rep. ¶ 94,198, at 91,734 (2d Cir. 1989) (Newman, J., dissenting from denial of rehearing en banc), *petition for cert. filed sub nom. Milken* v. *SEC*, — U.S.L.W. — (U.S. April 5, 1989) (No. 88-1628).

[2] Whether a Section 455(b) violation can ever be disregarded as "harmless error" and, if so, under what circumstances are questions

(footnote continued on following page)

4. Polaroid repeatedly refers to Judge Zobel's interlocutory order of October 11, 1985 as "a Rule 54(b) judgment," but it makes no attempt to show that the order in fact met the requirements of Rule 54(b), and clearly it did not. The order did not dispose of any "liability claims," but only of "issues decided"; and it expressly provided that "the amount of damages" and several other specified "issues" would be determined "in a subsequent trial," which is yet to be held. Polaroid does not try to explain how it can hope to recover $12 billion in damages on the basis of claims that have already been merged into a final judgment. Under the circumstances, it is hardly surprising that even the court below declined to accept Polaroid's argument that the October 11, 1985 order constituted a "Rule 54(b) judgment."

Equally unsupportable is Polaroid's suggestion that Judge Zobel was somehow correct in declining recusal in October 1981. According to Judge Mazzone—Judge Zobel herself made no findings on the recusal issue—"she was able to determine the case in such a way that . . . stockholders in either company would have been affected" (Pet. App. D6-7), and "the outcome was uncertain" (*id.* D7). These findings, which the court of appeals did not disturb, are dispositive of the disqualification issue, for Section 455(b)(5)(iii) required Judge Zobel to recuse herself once she knew that her mother-in-law had "an interest that could be substantially affected by the outcome of the proceeding." By her own acknowledgment, Judge Zobel learned of that interest on October 4, 1981 (Pet. App. B2). A premise of

---

(footnote continued from preceding page)

raised in a petition for certiorari presently pending before this Court. *Parker* v. *Connors Steel Co., petition for cert. filed,* 57 U.S.L.W. 3655 (U.S. March 14, 1989) (No. 88-1535). In the present case, however, Judge Zobel's Section 455(b) violation was clearly not harmless. *See* Pet. 12-14.

the decision below was that Judge Zobel was disqualified from that date onward. Polaroid's contrary argument is without merit.

5. At bottom, the flaw in Polaroid's argument lies in its failure to come to grips with the important purpose underlying Section 455(b)—promoting public confidence in the impartiality of federal judges. *See* Pet. 8. Congress has decreed that if a judge presides over a case knowing that the outcome "could" have a substantial effect on a close relative's interest, the public may suspect, rightly or wrongly, that the decision is the product of judicial bias. Strict enforcement of this congressional mandate is essential to preserving public confidence in the federal judicial system. Doing so may exact a price in terms of efficiency and even "fairness" to a particular litigant, but the important societal values inherent in Section 455(b) dictate that this price be paid. *See Potashnick* v. *Port City Construction Co., supra,* 609 F.2d at 1115 ("The unfairness and expense which results from disqualification . . . can be avoided . . . only if each judge fully accepts the obligation to disqualify himself in any case in which his impartiality might reasonably be questioned").[3]

The considerations advanced by Polaroid and by the court below are insufficient justification for upholding a decision rendered by a judge disqualified by statute because of a family financial interest in one of the parties. The

[3] A recent amendment to Section 455 has reconfirmed the congressional judgment that efficiency and fairness are insufficient justification for allowing federal judges to preside over cases in which they or their families have a financial interest "that could be substantially affected by the outcome." Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1007, 102 Stat. 4642, 4667 (Nov. 19, 1988). *See* H.R. Rep. No. 100-889, 100th Cong., 2d Sess. 68 (1988). The text of this amendment is set forth as an addendum to this memorandum.

appellate courts have frequent occasion to reverse decisions for errors of law, sometimes undoing years of litigation effort as a result. Here the error is of far greater import—to the judicial system and to the public at large—than the errors requiring reversal in the average case.

For these reasons, and for the reasons set forth in the petition, certiorari should be granted.

Respectfully submitted,

RICHARD E. CARLTON
125 Broad Street
New York, New York 10004
(212) 558-4000

Counsel for Petitioner

ROBERT MACCRATE
EDWARD W. KEANE

SULLIVAN & CROMWELL

Of Counsel

April 19, 1989

Addendum

Judicial Improvements and Access to Justice Act, Public Law No. 100-702, § 1007 (102 Stat. 4642, 4667) (November 19, 1988)

Sec. 1007. Judicial Disqualification Amendment.

Section 455 is amended by adding at the end thereof the following:

"(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification."